STATE OF MICHIGAN

COURT OF APPEALS

DAVID VANDERHYDE, CAROL VANDERHYDE, and THOMAS J. VANDERHYDE,

Plaintiffs/Counter-Defendants/Third Party Defendants-Appellees,

and

EVANS FORD CORPORATION, d/b/a VANDERHYDE-MCKIMMY FORD,

Plaintiff/Counter-Defendant-Appellees,

and

VANDERHYDE BROTHERS FORD, INC., SHAWN VANDERHYDE, DANIEL C. CARBONNEAU, LILLIAN T. CARBONNEAU, JANE RUSSELL, RU-CHAR, INC., PERRY MCKIMMY, and FAYE MCKIMMY,

Third Party Defendants-Appellees,

v

AMERICAN WAY GENERAL INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
February 26, 1999

No. 179289
Kalamazoo Circuit Court
LC No. 90-003643 CK

AFTER REMAND

AMERICAN WAY SERVICE CORPORATION,

Plaintiff-Appellant,

v

SCHENK, BONCHER & PRASHER, GARY P. SCHENK, and GREGORY G. PRASHER,

Defendant-Appellees.

No. 180527
Kalamazoo Circuit Court
LC No. 93-003566 CZ

AFTER REMAND

Before: Cavanagh, P.J., and Holbrook, Jr., and Jansen, JJ.

PER CURIAM.

This case is before us for a second time. This is a complex case involving financial transactions centered on the sale and resale of a Ford vehicle dealership. In Docket No. 179289, a judgment was entered following a bench trial in which the trial court ruled against American Way General Insurance Company ("American Way").[1] In Docket No. 180527, the trial court awarded summary disposition in favor of defendants pursuant to MCR 2.116(C)(7). The cases were consolidated for review by this Court. On appeal, we initially reversed the trial court's pretrial order in Docket No. 179289 granting plaintiffs summary disposition, in which the trial court held that a mortgage executed between Perry McKimmy and American Way was invalid because it was not signed by both Perry McKimmy and his wife Faye McKimmy. *Vanderhyde v American Way General Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued March 31, 1998. (Docket Nos. 179289 and 180527) (hereinafter "*Vanderhyde I*"). We concluded that the mortgage was valid to the extent of Perry McKimmy's 33 percent interest in the dealership real estate. We then remanded the case to the trial court for further consideration of the issues in light of our reversal. We reaffirm the holding set forth in our previous opinion, and affirm the trial court's disposition of all other issues.

I

The underlying facts of this case were set forth in our previous opinion:

> In 1986, the then-owners of the . . . automobile dealership conveyed by warranty deed their interest in the real estate on which the dealership was located "to DAVID W. VANDERHYDE and CAROL L. VANDERHYDE, husband and wife, as to an undivided 34% interest, THOMAS J. VANDERHYDE, a single man, as to an undivided 33% interest, and PERRY McKIMMEY [sic], a single man, as to an undivided 33% interest." Because the deed did not state otherwise, it is presumed

> under Michigan law that David and Carol Vanderhyde, took their single share as tenants by the entirety, as husband and wife between themselves, and as tenants in common with Thomas Vanderhyde and Perry McKimmy, each of whom took their respective shares individually. MCL 554.44, 554.45; MSA 26.44, 26.45; Michigan Land Title Standards (5th ed), Standard 6.7
>
> In 1989, the Vanderhydes agreed to sell their respective interests in the dealership to [Perry] McKimmy, who would become the sole owner. To finance the deal, [Perry] McKimmy executed, on August 22, 1989, a mortgage and four promissory notes, totaling $395,000, in favor of American Way. One promissory note for $97,000 was secured by a second mortgage on the dealership real estate. This mortgage and note was executed by Perry McKimmy. Three days later, on August 25, 1989, the Vanderhydes quitclaimed their respective shares of the dealership to "PERRY McKIMMY, JR., and FAYE A. McKIMMY, husband and wife as joint tenants with full rights of survivorship. [*Vanderhyde I*, *supra*, at 2-3.]

We concluded that because the status of the 33 percent of share in the property conveyed to Perry McKimmy in 1986 remained unchanged by the 1989 transactions, "the mortgage and note was valid at least to the extent of his individual 33 percent interest in the property." *Id.* at 3. In a related endnote, we also made the following observation:

> 1. We further note that American's lien against the property, as a result of the purchase money mortgage executed by Perry McKimmy, was superior to Faye McKimmy's inchoate dower right in the mortgaged land. See Michigan Land Title Standards (5th ed), Standard 4.5.

In its opinion on remand, the trial court noted that this endnote was of great concern to the parties. The trial court then observed that the Vanderhydes' argument that the mortgage at issue could not be a purchase money mortgage given that the funds advanced by American Way were not used to purchase the 33 percent interest back in 1986 has merit. The trial court, however, deferred to this Court on the question of whether endnote 1 is the law of the case.

We today hold that the law of the doctrine does not apply to endnote 1 in *Vanderhyde I*. Our observations were dicta; they were not necessary to our prior determination about the validity of the mortgage. *Kalamazoo v Dep't of Corrections (After Remand)*, 229 Mich App 132, 135; 580 NW2d 475 (1998). Those observations also did not impact our conclusion that "to the extent of Perry McKimmy's individual 33-percent interest in the property, [the Vanderhydes'] . . . slander of title claim against American is dismissed." *Id.* at 4.

We further hold that to the extent of the 67 percent share of the dealership purchased by Perry McKimmy in 1989, the trial court correctly ruled Vanderhydes' slander of title claim could not be sustained due to the lack of evidence establishing the malice element of the cause of action. *Stanton v*

Dachille, 186 Mich App 247, 262; 463 NW2d 479 (1990). On the basis of the record before us, we do not believe that malice was or could be established. *Id.*

As for the other issues raised on appeal, the trial court concluded that no further action was necessary. Accordingly, we now address the remaining issues not addressed by our earlier opinion.

DOCKET NO. 179289

I

American Way argues that in the event the written mortgage is held invalid, it is entitled to receive an equitable mortgage in the property. Because we have held that the mortgage is valid with regard to the Perry McKimmy's 33 percent share, we consider whether an equitable mortgage should be created in the remaining 67 percent of the dealership property.

"Generally an equitable mortgage will be imposed where it is shown that there was an intention to place a lien on the real estate or a promise that the real estate would be used as security but for some reason the intended purpose was not accomplished. 1 Cameron, Jr., Michigan Real Property Law (2d ed), § 18.5, p 658. We agree with the trial court that the circumstances of this case do not indicate that the imposition of an equitable mortgage on the remaining 67 percent share is required.

II

Next, American Way argues that the trial court erred when it found that it had chosen not to pursue it rights as a shareholder in the dealership. We disagree. After reviewing the record, it is clear to us—as it was to the trial court—that American Way never pursued the avenues of relief available to it as a shareholder in the dealership. American Way elected to pursue its creditor's remedies to the exclusion of challenging the Vanderhydes' operation of the dealership.

III

American Way argues that the trial court erred when it ruled that after the Vanderhydes had purchased the dealership, the dealership did not assume as a corporate obligation American Way's loan to Perry McKimmy. We disagree. McKimmy testified at trial regarding the individual nature of the loan. Even one of American Way's own attorneys testified that the dealership never signed any document promising to pay or guaranteeing the debt. This testimonial evidence was supported by the fact that American Way's monthly statements identify Perry McKimmy as the "BORROWER." In light of this record, we conclude that the trial court's finding was not clearly erroneous.

IV

The next two issues raised by American Way both implicate the Bulk Sales Act (hereinafter "the Act"), MCL 440.6102 *et seq.*; MSA 19.6102 *et seq.* The relevant statutory provisions are quoted below.

A "bulk transfer" is any transfer in bulk, not in the ordinary course of the transferor's business, of a major part of the materials, supplies, merchandise, or other inventory as defined in [MCL 440.9109; MSA 19.9109] . . . , of an enterprise subject to this article. [MCL 440.6102; MSA 19.6102.]

Except as provided with respect to auction sales . . . a bulk transfer subject to this article is ineffective against any creditor of the transferor unless:

(a) The transferee requires the transferor to furnish a list of his existing creditors prepared as stated in this section . . . . [MCL 440.6104(1)(a); MSA 19.6104(1)(a).]

In addition to the requirements of the preceding section, any bulk transfer subject to this article except one made by auction sale . . . is ineffective against any creditor of the transferor unless at least 10 days before he takes possession of the goods or pays for them, whichever happens first, the transfer in the manner and to the persons hereafter provided . . . . [MCL 444.6105; MSA 19.6105.]

No action under this article shall be brought nor levy made more than 6 months after the date on which the transferee took possession of the goods unless the transfer has been concealed. If the transfer has been concealed, actions may be brought or levies made within 6 months after its discovery. [MCL 440.6111; MSA 19.6111.]

A

American Way challenges the trial court's conclusion that American Way's claim against the Vanderhydes brought under the Act was barred by the Act's statute of limitations. We see no clear error. Because American Way was a potential creditor, the Vanderhydes should have required that Perry McKimmy "furnish a list of his existing creditors." MCL 440.6104(1)(a); MSA 19.6104(1)(a). Further, pursuant to MCL 444.6105; MSA 19.6105, the transfer was ineffective as to American Way because the Vanderhydes failed to give notice to American Way. However, because American Way's claim was brought more than six months after the date on which the Vanderhydes purchased the dealership from Perry McKimmy, and more than six months after the subsequent resale of the dealership to Ru-Char, Inc., American's claim against the Vanderhydes was barred. MCL 440.6111; MSA 19.6111.

B

American Way further argues that the trial court erred when it ruled that American Way's claim against Ru-Char, Inc. also brought under the Act was similarly barred by the six months statute of

limitations. We once again disagree. There is no indication that the transfer of the dealership from the Vanderhydes to Ru-Char, Inc. was concealed from American Way. MCL 440.6111; MSA 19.6111. Accordingly, we see no clear error.

V

Next, American Way argues that the trial court erred when it concluded that neither the Vanderhydes nor Ru-Char, Inc. was liable for conversion. We disagree.

In a civil context, the Michigan Supreme Court has defined conversion "as any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992). Accord *Thoma v Tracy Motor Sales, Inc*, 360 Mich 434, 438; 104 NW2d 360 (1960). The Restatement of Torts defines conversion as follows: "Conversion is an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel." 2 Restatement Torts, 2d, § 222A(1), p 431.

With respect to American Way's claim of conversion against the Vanderhydes, we initially note that American Way's asserted interest in one-third of the dealership is an interest in real property, not personal property or chattels. Furthermore, we do not believe the record supports a conclusion that the Vanderhydes alleged interference was so severe that it seriously interfered with American Way's rights therein. We believe that the record supports a finding that the Vanderhydes acted in good faith. It also supports a finding that any inconvenience caused was the result of Perry McKimmy's actions, not actions undertaken by the Vanderhydes. Therefore, while we have disagreed in part with the trial court about the validity of American Way's mortgage, we nonetheless do not believe that given the record before us, justice requires a reinstatement of the conversion charge vis-à-vis the dealership property. Restatement, § 222A, p 431.

We also believe that the trial court correctly concluded that American Way had no interest in the 50,000 newly issued stock certificates because its security agreement with Perry McKimmy did not specifically cover unissued stock. As for the 50,000 previously issued shares in which American Way has a perfected security interest, the record indicates that Perry McKimmy never delivered to American Way the stock power associated with those shares, and that American Way chose not to exercise any shareholder rights it might have held as result of their possessory interest in those shares. We also note that. Accordingly, the trial court did not error in concluding that the conversion claim against the Vanderhydes should fail. We also agree with the trial court that Ru-Char, Inc. did not commit conversion when it purchased the corporate assets of the dealership from the Vanderhydes. The actions of Ru-Char, Inc. did not unjustly interfere with any of American Way's rights in personal property.

VI

American Way also argues that the trial court erred in admitting into evidence the November 20, 1990 amendment to the September 19, 1990 purchase agreement executed between the Vanderhydes and Perry McKimmy. We disagree.

After the November 20, 1990 amendment was disclosed, the trial court ordered discovery reopened. After inquiring into the authenticity of the November 20, 1990 agreement, and the circumstances surrounding its late disclosure, the trial court ruled as follows:

> The court finds that the November 20, 1990 agreement is relevant and receives it into evidence . . . . [T]he court believes the explanations of the Vanderhyde brothers and their attorney from which it appears that the failure to provide the document was the result of mistake, not design. . . . Even so, sanctions are in order pursuant to MCR 2.313(B) and (D) in the form of reasonable attorney fees and expenses caused by the failure to produce the document.

We also agree that the November 20, 1990 amendment was relevant to the proceedings. MRE 402. We see no abuse of discretion in the manner in which the trial court handled its admission into evidence. See *Price v Long Realty*, 199 Mich App 461, 466; 502 NW2d 337 (1993).

DOCKET NO. 180527

VII

American Way argues that the trial court erred in summarily dismissing under MCR 2.116(C)(7) American Way's claims against the Vanderhydes' attorneys for conversion, interference with contract, fraud and civil conspiracy. Specifically, American Way argues because there was no identity of parties between the cause of action in Docket No. 179289 and the cause of action in Docket No. 180527, the trial court erred in basing that dismissal on the doctrine of collateral estoppel. We disagree.

"The doctrine of collateral estoppel holds that, where the first and second causes of action are different, 'the judgment [rendered in the first cause of action] is conclusive between the parties in such a case as to questions actually litigated and determined by the judgment.'" *Alterman v Rovizer, Eisenberg, Lichtenstein & Pearlman, PC*, 195 Mich App 422, 424; 491 NW2d 868 (1992), quoting *Howell v Vito's Trucking Co*, 386 Mich 37, 42; 191 NW2d 313 (1971).

We agree with the trial court that in the unique circumstances of the present case, American Way should be collaterally estopped from relitigating these claims through cause of action brought against the Vanderhyde attorneys. American way had a fair opportunity to fully litigate each of these

claims in the prior lawsuit. We agree with the trial court that as a matter of public policy, American Way should not be allowed to relitigate these matters by bringing a lawsuit against their opponents' attorneys in the first lawsuit (Docket No. 179289). Therefore, we conclude the lack of identity and mutuality of the parties should not bar summary disposition under MCR 2.116(C)(7) given: (1) the circumstances of the case; (2) the focus of the rule of collateral estoppel is issue preclusion, see Restatement Judgments 2d, §27, comment b, pp 251-252; and (3) the flexible nature of the rule, *Detroit v Qualls*, 434 Mich 340, 357 n 30; 454 NW2d 374 (1990). See *Alterman, supra* at 427.

VIII

Finally, for the same reasons just stated, we disagree with American Way's contention that the trial court erred when granting summary disposition to the Vanderhyde attorneys pursuant to MCR. 2.116(C)(7) on American Way's claim of abuse of process. See discussion VI *supra*. In any event, we do not believe that the record supports a claim of abuse of action against the Vanderhyde attorneys.

We reaffirm the holding set forth in our previous opinion, and affirm the trial court's disposition of all other issues.

/s/ Mark J. Cavanagh
/s/ Donald E. Holbrook, Jr.
/s/ Kathleen Jansen

[1] American Way General Insurance Company was merged into American Way Service Corporation in 1991. Therefore, the designation "American Way" will be used in both Docket No. 179289 and Docket No. 180527.